LIBRARY

Supreme Court, U.S.
FILED
JUN 22 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

70-320

No. ~~1865~~

WILLIAM F. JORDAN and WILLIAM A. ROGERS,
on Behalf of Themselves and All Others Similarly Situated,
Petitioners,

v.

MONTGOMERY WARD & CO., Incorporated,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals.
for the Eighth Circuit

SIGAL & SAVELKOUL
DONALD C. SAVELKOUL
SAMUEL I. SIGAL
1020 Plymouth Building
Minneapolis, Minnesota 55402
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

INDEX

	Page
Prayer	1
Opinions below	1
Jurisdiction	2
Question presented	2
Statutory provisions and regulations involved	2
Statement of the case	3
Reasons for granting the writ	7
1. Case involves important question of first impression	7
2. Class action involved	8
3. Millions of consumers and many nationwide catalog merchandisers affected	8
4. Lower courts decision is a serious hindrance to effective enforcement	9
Conclusion	10
Appendix A—Opinion of Eighth Circuit Court of Appeals	A-1
Appendix B—Decision of District Court	A-8
Appendix C—Statutory provisions	A-12
Appendix D—Statutory regulations	A-19

Cases Cited

American Federation of Musicians v. Wittstein, 379 U. S. 171 7
Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387 8
Patterson v. Lamb, 329 U. S. 539 8
Rice v. Sioux City Cemetery, 349 U.S. 70 8
Rothensies v. Electric Battery Co., 329 U. S. 296 9

Statutes Cited

15 U.S.C., § 1637(c) 3
15 U. S. C., § 1640(a) 2, 8, 9
28 U. S. C., § 1254(1) 2

Text Cited

Standard & Poor's Industry Surveys, Retailing, Volume 2 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

WILLIAM F. JORDAN and WILLIAM A. ROGERS,
on Behalf of Themselves and All Others Similarly Situated,
Petitioners,

v.

MONTGOMERY WARD & CO., Incorporated,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

The Petitioners William F. Jordan and William A. Rogers on behalf of themselves and all others similarly situated respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding May 3, 1971.

OPINIONS BELOW

The opinion below of the Court of Appeals is reported at ... F. 2d ... (8th Cir., 1971); Commerce Clearing House, Instalment Credit Guide, Consumer Credit, Para. 99,502 (*infra*, pp. A-1–A-7). The opinion of the District Court is reported at 317 F. Supp. 948 (D. C., Minn., 1970) (*infra*, in relevant part, pp. A-8–A-11).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on May 3, 1971. A timely petition for re-hearing was denied on May 20, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C., § 1254(1).

QUESTION PRESENTED

Whether a catalog consumer credit customer has the same right of action under the civil liability provisions of the Truth in Lending Act as a non-catalog consumer credit customer, or, in restated form, whether a merchandiser's catalog containing credit terms differing from his original disclosure and not in compliance with Truth in Lending is mere advertising under that Act, regardless of the statements therein contained and the reliance thereon by consumers who are thereby induced to purchase, and therefore the civil liability provisions do not apply.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. 15 U. S. C., § 1640 (a), provides:

(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the lia-

bility under this paragraph shall not be less than $100 nor greater than $1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

2. The provisions of the Truth in Lending Act are contained in Title I of the Consumer Credit Protection Act (Public Law 90-321; 82 Stat. 146), and in relevant part set forth *infra*, pp. A-12–A-18.

3. Pursuant to the Act, the Federal Reserve Board has issued Regulation Z, 12 CFR 226, and in relevant part set forth *infra*, pp. A-19–A-26.

STATEMENT OF THE CASE

This action is brought by the petitioners on behalf of themselves and all others similarly situated under the Truth in Lending Act. The petitioners are catalog purchasers of the respondent, a retail merchant whose sales in substantial part are derived from its catalog operations.

Respondent had a so-called "open end consumer credit plan" for its customers. After the enactment of Truth in Lending, and in accordance with 15 U. S. C. § 1637 (c), *infra*, it sent out notices to its customers containing in part the following information:

"MONTGOMERY WARD CHARG-ALL ACCOUNT AGREEMENT

Montgomery Ward & Co., Incorporated: With respect to my Wards Charg-all account, I agree to the following regarding all purchases made by me or on my Charg-all Identification Plate:

1. I will pay the time sale price for all purchases, consisting of the cash sale price and a *finance charge* at

a periodic rate of 1½% per month (minimum charge 50¢) on the previous month's ending balance of my account (*annual percentage rate* 18%). I may at any time pay the full amount due.

2. Payment will be made by me in monthly installments equal to a minimum of 1/20th of my highest account balance adjusted to the next dollar amount (minimum $5). However, if within 30 days from my billing date I pay the full outstanding balance shown on my monthly statement, no *finance charge* on such balance will be charged on any subsequent statement.

3. Title to the goods purchased hereunder, except for motor vehicle purchases, shall remain in you until the unpaid balance of each separate purchase is fully paid. Upon default by me, my entire balance shall at your option become due and payable.

4. It is understood that the applicable Charg-All Agreement used by you in the state of my residence shall govern my purchases."

Unlike the consumer who shops in a retail establishment, a typical catalog purchaser examines the catalog at home and then places his order by filling out an order blank contained in the catalog, or by calling the catalog department and placing the order by telephone.

William F. Jordan purchased merchandise from Ward's "Great 1970 Winter Sale" catalog. The particular page from which the purchase was made contained the following heading in conspicuous circular form: "PRE-SEASON SPECIAL, No Monthly Payments Till June".[1]

[1] The specific catalog pages from which the purchases were made are listed as exhibits in the Appendix in the Circuit Court proceedings, together with other pertinent pages from the same catalogs.

William A. Rogers purchased merchandise from a similar catalog of Ward's in September, 1969. The catalog statement of Wards in connection with this purchase was: "NO MONTHLY PAYMENTS TILL FEBRUARY when you order stereo on credit at Wards—see page 3". An additional page in this catalog contained the following language: "NO MONTHLY PAYMENT TILL FEBRUARY on appliances and home furnishings ordered on credit from any Ward's catalog or store." Also on that same page appears the statement: "If your order is being added to an account that is already opened, there will be no monthly payment increase til February, 1970."

Subsequently, it was learned that Wards imposed finance charges on these purchases based on purchase dates, and not based on dates when the monthly payments were first due. The finance charges imposed were in the amount of 1½ per cent per month, based on the previous month's ending balance, a minimum of 18 per cent per annum.

Paragraph 7 of the complaint provides as follows:

> "7. While so engaged in advertising for sales, making credit sales, and sending periodic statements to plaintiffs and the members of their class which plaintiffs represent, defendant has violated and continues to violate the Act of Congress of May 29, 1968, 82 Stat. 146 et seq. (15 U. S. C. A. Section 1601, et seq.), and the Regulations which were adopted pursuant to said Act, and which are contained in Regulation Z, 12 CFR 226, in the following respects, among others:
>
> a. By failing to disclose that any finance charge is being imposed on items offered for sale and all as required by 12 CFR 226.10;
>
> b. By failing to disclose and express its applicable minimum finance charge in excess of fifty (50) cents in terms of an annual percentage rate

in accordance with the requirements of Regulation Z, 12 CFR 226.5 (a) (3) (i) and Section 127 of the Act of Congress of May 29, 1968, 32 Stat. 153 (15 U. S. C. A., Section 1637 (b) (6));

c. By stating that no payments whatsoever are required until some future date, without disclosing the imposition of a finance charge thereon;

d. By containing numerous pages of advertisements of products and prices without any reference to the imposition of finance charges;

e. By failing to disclose on its periodic statements that the periodic rate exceeds 1.5% per month and an annual percentage rate of eighteen per cent (18%) because credit is not given for payments made and returns made during the billing cycle;

f. By failing to disclose the amount of the balance to which each annual percentage rate is applicable in accordance with the requirements of Regulation Z, 12 CFR 226.7 (b) (6) and Section 127 of the Act of Congress of May 29, 1968, 82 Stat. 153 (15 U. S. C. A., Section 1637 (b) (5));

g. By failing to make all required disclosures in a clear and conspicuous manner as required by Regulation Z, 12 CFR, Section 226.6 (a); and

h. By separating the required disclosures so as to confuse, mislead and obscure or detract attention from the information required to be disclosed as prohibited by Regulation Z, 12 CFR 226.7 (c) (4)."

On motion of respondent to strike, which the District Court treated as a motion to dismiss, subparagraphs a, c and d were dismissed for lack of jurisdiction over the subject matter. On appeal, the Circuit Court reinstated subparagraph c.

The Courts below held, in short, that a merchandiser's catalog is mere advertising, and as such, however deficient under Truth in Lending, may not support an action for civil liability. In effect, it was held that catalogs could only be considered under Part C of the Truth in Lending Act, which relates to credit advertising, and that they could not be considered under Part B which relates to credit transactions and which contains the civil liability section, even though a consumer transaction occurred and a violation of Part B could be shown by the use of the catalog involved.

REASONS FOR GRANTING THE WRIT

1. Case involves important question of first impression

The question presented is an important one of first impression under the Truth in Lending Act, and is therefore a basis for granting certiorari. **American Federation of Musicians v. Wittstein**, 379 U. S. 171, 175. The lower court has held, in effect, that a catalog merchandiser is only required to give an initial disclosure, and then follow up with periodic statements with respect to purchases made (these would arrive after the unknown finance charges had commenced), and that new and non-complying representations by the merchandiser in his catalog are not governed by Part B of the Truth in Lending Act. The result here is that the purchaser who thought he was to pay "x" dollars commencing in June for merchandise purchased in January subsequently learns it is "x" dollars plus 1.5% compounded monthly from January, which is an entirely different plan than contained in the original disclosure. An important credit term, i.e. the date on which the finance charge is to commence, was not disclosed.

2. Class action involved

The question presented is not confined to the petitioners William Jordan and William Rogers. They have instituted this proceeding as a class action to include all others similarly situated. But the question involved goes far beyond the entire class in this particular suit and the particular respondent merchandiser.

3. Millions of consumers and many nationwide catalog merchandisers affected

The issue involves catalog purchasers throughout the United States and catalog merchandisers throughout the United States. The amount of catalog selling by giant retail merchants such as respondent is in the billions of dollars of annual sales, most of which is on credit.[2] The question is whether catalog consumers are to have the same rights under the Truth in Lending Act for violations thereof as other consumers—whether they can use the catalog to prove a credit disclosure violation under Part B of Truth in Lending where the catalog has caused a consumer credit transaction to occur. In our view, the catalog customer can prove he has a right of action under 15 U. S. C. 1640 (a), *supra*, of Part B even though the non-complying catalog may also be in violation of Part C relating to credit advertising. Catalog merchandisers mail their catalogs to valued customers, who should have the same rights as customers of non-catalog retailers who mail out non-complying disclosure amendments to their customers.

The issue therefore involves the consuming public generally and is a reason for granting certiorari. **Layne & Bowler Corp. v. Western Well Works**, 261 U. S. 387, 393; **Rice v. Sioux City Cemetery**, 349 U. S. 70, 79; **Patterson v. Lamb**, 329 U. S. 539.

---

[2] Standard & Poor's, Industry Surveys, Retailing, August 6, 1970, Volume 2, page R. 131.

4. Lower courts decision is a serious hindrance to effective enforcement

A fundamental purpose of the Truth in Lending Act was to provide consumers with information concerning the cost of credit. There is no reason to suppose that the Congress intended that catalog consumers be less informed than other consumers. As part of the statutory scheme for the enforcement of this act, Congress provided a civil right of action by consumers in 15 U. S. C. 1640 (a), *supra.* Catalog consumers who consummate consumer credit transactions in connection with non-complying catalogs are entitled to the same right of action where they can prove a failure to disclose required information under Part B, 15 U.S.C., § 1637(a), 12 Cfr 226.7(a), (e), (f) *infra.* There is no exemption in Part B for catalog merchandisers. The lower court has failed to distinguish between a catalog customer and a reader of an advertisement. As we read it, the legislative history cited by the lower court, does not relate to catalog purchasers who have entered into actual consumer credit transactions.

To deny a catalog consumer who has entered into a consumer credit transaction the right to proceed under 15 U. S. C., § 1640 (a) by dismissing allegations concerning the catalog and thus rendering the catalog inadmissible in evidence is a serious hindrance to effective administration of the law caused by the lower court decision. This is an additional reason for granting certiorari. **Rothensies v. Electric Battery Co.,** 329 U. S. 296. Without the catalog, there remains only the original disclosure and the periodic statement which is sent **after** purchase, both of which may be in compliance with the Truth-in-Lending Act.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

SIGAL and SAVELKOUL

DONALD C. SAVELKOUL

SAMUEL I. SIGAL
1020 Plymouth Building
Minneapolis, Minnesota 55402
Attorneys for Petitioners

June 21, 1971